

BRB No. 07-0634 BLA

W. H. )  
(Widow of D. G. H.) )  
 )  
Claimant-Respondent )  
 )  
v. )  
 )  
U.S. STEEL MINING COMPANY )  
 ) DATE ISSUED: 04/30/2008  
Employer-Petitioner )  
 )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
 )  
Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order-Award of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Howard G. Salisbury (Kay, Casto & Chaney PLLC), Charleston, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Award of Benefits (05-BLA-5532) of Administrative Law Judge Richard T. Stansell-Gamm rendered on a survivor's claim<sup>1</sup> filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).<sup>2</sup> The administrative law

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<sup>1</sup> Claimant is the widow of the deceased miner, who died on November 2, 2002. Director's Exhibit 10.

<sup>2</sup> The miner filed a claim for benefits on February 21, 2001. Director's Exhibit 2. The district director awarded benefits on November 7, 2002, and employer agreed to pay

judge credited the miner with approximately two years of coal mine employment.<sup>3</sup> Decision and Order at 7 n. 7. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge determined that because the existence of pneumoconiosis arising out of coal mine employment was established in the miner's successful claim for lifetime benefits, employer was collaterally estopped from relitigating that issue in the survivor's claim. The administrative law judge further found that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in applying the doctrine of collateral estoppel. Employer further asserts that the administrative law judge erred in his analysis of the medical evidence in finding that the miner's death was due to pneumoconiosis. Claimant did not participate in this appeal. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205; *Trumbo v. Reading*

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benefits. *Id.* Claimant filed this survivor's claim on November 19, 2002. Director's Exhibit 4. The district director denied survivor's benefits on December 22, 2003. Director's Exhibit 18. On October 15, 2004, claimant requested modification and submitted a report by Dr. Perper. Director's Exhibit 21; *see* 20 C.F.R. §725.310. The district director granted modification and awarded survivor's benefits on December 10, 2004. Director's Exhibit 24. Employer requested a hearing before the Office of Administrative Law Judges, and a hearing was scheduled for May 10, 2005. Prior to the hearing, the parties agreed to a decision on the record.

<sup>3</sup> The record indicates that the miner's last coal mine employment occurred in West Virginia. Director's Exhibit 1. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

*Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(2), (4). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992).

Employer contends that it should not have been collaterally estopped from relitigating the existence of pneumoconiosis in this survivor's claim, based on the prior finding of pneumoconiosis in the miner's claim.<sup>4</sup> Employer does not argue that the elements of collateral estoppel have not been established. Instead, employer argues that a newly submitted CT scan, dated May 16, 2002, contained in the miner's medical treatment records submitted by claimant, revealed the presence of bullous emphysema but no interstitial fibrosis. Employer argues that since CT scans are highly reliable, the administrative law judge should have found an exception to the application of collateral estoppel in this case. We disagree.

The administrative law judge correctly observed that a claimant seeking survivor's benefits may rely on the doctrine of offensive nonmutual collateral estoppel to establish

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<sup>4</sup> Collateral estoppel forecloses "the relitigation of issues of fact or law that are identical to issues which have actually been determined and necessarily decided in prior litigation in which the party against whom [issue preclusion] is asserted had a full and fair opportunity to litigate." *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999)(*en banc*), quoting *Ramsey v. INS*, 14 F.3d 206 (4th Cir. 1994). To invoke the doctrine of collateral estoppel, the party asserting it must establish the following criteria:

- (1) the issue sought to be precluded is identical to the one previously litigated;
- (2) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding;
- (3) determination of the issue must have been necessary to the outcome of the prior determination;
- (4) the prior proceeding must have resulted in a final judgment on the merits; and
- (5) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

*Collins v. Pond Creek Coal Mining Co.*, 468 F.3d 213, 217, 23 BLR 2-393, 2-401 (4th Cir. 2006).

that the deceased miner had pneumoconiosis arising out of coal mine employment. *Collins v. Pond Creek Coal Mining Co.*, 468 F.3d 213, 23 BLR 2-393 (4th Cir. 2006)(Shedd, J., dissenting). In addressing employer’s argument that the May 16, 2002 CT scan reading was new, more reliable evidence<sup>5</sup> justifying an exception to collateral estoppel, the administrative law judge accurately noted that the Board “has not held that any and all new evidence prevents the application of collateral estoppel.” Decision and Order at 6. The administrative law judge correctly noted that an exception may be appropriate in a survivor’s claim if the new evidence introduced is highly reliable evidence, such as autopsy results. *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 n. 2 (1999)(*en banc*); *accord Zeigler Coal Co. v. Director, OWCP [Villain]*, 312 F.3d 332, 22 BLR 2-581 (7th Cir. 2002).

Applying these principles, the administrative law judge found that employer did not demonstrate that the May 16, 2002 CT scan was the kind of evidence that would justify an exception to the application of collateral estoppel:

The Employer argues that CT scans are “more definitive” than chest x-rays on the issue of diagnosis. The Employer notes that Dr. Castle commented on the importance of CT scan imagery in his report. Dr. Castle wrote: “[A] high resolution CT scan did not show evidence of interstitial disease or coal workers’ pneumoconiosis. This is a very sensitive imaging device and would clearly indicate that he most likely did not have either coal worker’s pneumoconiosis or asbestosis . . . .”

As noted by the Seventh Circuit in *Consolidation Coal Co. v. Director, OWCP [Stein]*, 294 F.3d 885, [22 BLR 2-409] (7th Cir. 2002), a CT scan is not a “magic bullet” to diagnose coal workers’ pneumoconiosis. The Seventh Circuit noted that there are no standardized guidelines for the interpretation of CT scans, so they may not be reliable. . . . Although Dr. Castle notes the sensitivity of the CT scan, he does not indicate whether standards have emerged to interpret its images and improve its diagnostic

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<sup>5</sup> Employer described this CT scan as new evidence that did not exist at the time of the miner’s claim, and the administrative law judge accepted employer’s description without further discussion. Decision and Order at 6. While not dispositive of our analysis herein, we note that, contrary to employer’s description, the record reflects that this CT scan was in existence at the time the miner’s claim was pending. In its brief, employer does not explain why this CT scan could not have been discovered and adduced at the time of the miner’s claim. See *Hughes*, 21 BLR at 1-137, n. 2 (noting that newly discovered evidence is generally not accepted as a sufficient reason to preclude collateral estoppel).

reliability. Even if CT scans are more sensitive than chest x-rays, the Employer has not shown that CT scans are more like autopsies--*i.e.*, highly reliable--than chest x-rays or treatment records. Therefore, I do not find that CT scans are “highly reliable evidence” of the sort needed to prevent collateral estoppel in a survivor’s claim.

Decision and Order at 6.

The administrative law judge reasonably resolved this issue. Contrary to employer’s contention, the administrative law judge appropriately determined that, unlike autopsy evidence, CT scan evidence may not necessarily justify an exception to the doctrine of collateral estoppel in a survivor’s claim. *See Stein*, 294 F.3d at 890-93, 22 BLR at 2-417-22 (deferring to the agency’s judgment that CT scans are not more reliable than other tests at detecting or excluding pneumoconiosis). The administrative law judge acted within his discretion in finding that employer did not show that the CT scan in this case should be treated the same as highly reliable autopsy evidence. *Id.* Consequently, we reject employer’s allegation of error. As employer raises no other arguments on this issue, we affirm the administrative law judge’s application of collateral estoppel. We therefore affirm the administrative law judge’s finding that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203. *See Collins*, 468 F.3d at 221, 23 BLR at 2-406.

Employer contends that the administrative law judge erred in according greater weight to the opinion of Dr. Perper than to the opinion of Dr. Castle, in determining that claimant established that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

The miner’s death certificate, completed by Dr. Lucas, listed the immediate cause of death as cardiopulmonary failure, due to chronic obstructive disease, due in turn to “ASCVD.” Director’s Exhibit 10. Two medical reports addressed whether pneumoconiosis caused or hastened the miner’s death. Dr. Castle reviewed the miner’s medical records and stated that the miner did not suffer from pneumoconiosis. Dr. Castle opined that the miner’s death was due to “tobacco smoke induced pulmonary emphysema rather than pneumoconiosis,” and opined that the miner “died as and when he would have regardless of whether or not he worked as a coal miner.” Employer’s Exhibit 1.

Dr. Perper reviewed the miner’s medical records, and stated that the miner had clinical coal workers’ pneumoconiosis. Dr. Perper opined that the miner’s coal workers’ pneumoconiosis “resulting from occupational exposure to coal mine dust, was a substantial contributory cause of [the miner’s] severe chronic respiratory disease and related death and a hastening factor in his death.” Director’s Exhibit 23. Dr. Perper specifically acknowledged three pulmonary risk factors: cigarette smoke, asbestos

exposure, and coal mine dust. Dr. Perper opined that cigarette smoking was not a significant factor in the miner's death as he stopped smoking decades before his death, and his severe pulmonary symptoms appeared much later. Dr. Perper also opined that asbestos exposure was not a significant factor in the miner's death, as it was only reported by one physician, Dr. Forehand, and the radiographic evidence did not indicate the kind of "plaque" findings that are associated with asbestos exposure. Dr. Perper further opined that coal dust exposure was a significant factor in the miner's death, as the progression of the obstructive/restrictive nature of the miner's fatal pulmonary disease was consistent with coal workers' pneumoconiosis, and the type of emphysema that the miner had could be caused by cigarette smoking and coal mine dust. *Id.* at 12-13.

The administrative law judge initially found that Dr. Lucas's "terse" conclusions on the miner's death certificate merited "little probative weight in the absence of any explanation for his findings." Decision and Order at 21. The administrative law judge further found that Dr. Perper submitted a "well documented assessment" that was "sufficiently reasoned" to support a finding that coal workers' pneumoconiosis contributed to the miner's death. Decision and Order at 22. The administrative law judge found that, although Dr. Castle's opinion was reasoned, it merited "diminished probative value," because Dr. Castle did not believe that the miner had pneumoconiosis, and he therefore "completely eliminated coal workers' pneumoconiosis as one of [the miner's] pulmonary conditions," and consequently, did not address the role it may have played in his death. Decision and Order at 21-22.

Citing *United States Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999), employer contends that Dr. Perper's opinion is speculative and the administrative law judge erred in according the opinion any probative weight. We disagree. As the administrative law judge found, Dr. Perper opined that the miner's pneumoconiosis hastened his death from chronic respiratory disease, and provided detailed explanations for his conclusions with specific references in his discussion to the miner's pulmonary condition at the time of his death. Decision and Order at 22; Director's Exhibit 23. Thus, the administrative law judge properly treated Dr. Perper's opinion as sufficiently reliable and probative to carry claimant's burden. *Jarrell*, 187 F.3d at 389, 21 BLR at 2-648.

Additionally, employer argues that the administrative law judge erred in discounting Dr. Castle's opinion that the miner's death was unrelated to pneumoconiosis. Employer's contention lacks merit. The administrative law judge accurately found that Dr. Castle did not diagnose the miner with either clinical or legal pneumoconiosis. Since the administrative law judge found the existence of pneumoconiosis established, he "could only give weight to the causation opinions of the physicians who had not diagnosed pneumoconiosis 'if he provided specific and persuasive reasons for doing so, and those opinions could carry little weight, at the most.'" *Collins*, 468 F.3d at 224, 23

BLR at 2-412, quoting *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002). We therefore reject employer's contention that the administrative law judge erred in according diminished probative value to Dr. Castle's opinion regarding the cause of the miner's death.

Based on the foregoing, we affirm the administrative law judge's finding that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). We therefore affirm the award of survivor's benefits.

Accordingly, the administrative law judge's Decision and Order-Award of Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge